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IN THE

UNITED STATES SUPREME COURT

October Term, 1939

No. 28.

CITIES SERVICE OIL COMPANY, *Petitioner*,

vs.

B. P. DUNLAP, ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

OPINIONS OF COURT BELOW

Original opinion rendered by the Fifth Circuit on December 8, 1938, is reported in 100 Fed. (2d) 294, and opinion on rehearing rendered on February 24, 1939, is reported in 101 Fed. (2d) 314.

SUMMARY OF RESPONDENTS' ARGUMENTS

I. That the descriptions in the instruments of petitioner's chain of title, alone and irrespective of any fact proved or unproved upon the trial, as a matter of law, under applicable Texas decisions, bar petitioner from any status of innocent purchaser or claim of legal title by reason of the call for adjoinder in question. (Responsively vital to all Propositions of Petition except Proposition I, and to all petitioner's points except Point I.)

II. The description calls in the instrument of petitioner's title being shown, both on the face of such instruments and by the evidence of record, to be ambiguous, inharmonious and irreconcilable with each other, when the call for adjoinder is observed, or when an attempt is made to apply them on the ground, and petitioner having introduced evidence on its theory of the effect of the partition, which was rebuttable, neither the trial court nor the Circuit Court of Appeals in holding parol evidence admissible to determine the intent of the partitioners and the footsteps of the surveyor, under the applicable decisions of the Supreme Court of Texas.

III. That petitioner's claim of legal title by presumption based upon an abutting road is not supported by evidentiary facts essential to such presumption and is contrary to the express findings and holdings of the courts below. (Responsively vital to all Propositions of Petition and all Points of Petitioner's brief).

IV. That petitioner has exhibited that character of bad faith in equity, both toward respondents and the court in the instant case, in a matter having immediate and necessary relation to the equity sought by it in this litigation, as would deny it remedy in a court of equity.

V. That any holding of the Circuit Court of Appeals about the procedural issue of burden of proof was not essential to the determination of the case, and any declaration by said court upon such question was therefore mere dicta. (Responsive to Propositions II, IV and V of Petition and Second and Third Points of petitioner's brief).

Respondents feel obliged to offer an explanation why its major points above stated are here set forth for the first time and were not presented in its Opposing Brief to Petition for Writ of Certiorari. Unfortunately, counsel who briefed this case for respondents was suffering a fatally impairing malady, the seriousness of which and the degree of his impairment being unknown to him and to respondents until his work on this case was done, shortly prior to his death.

STATEMENT

We regret to state that petitioner's statement of the case cannot be accepted. The opinion of the Honorable Circuit Court of Appeals presents a fair outline of the case, and respondents adopt it in this behalf.

Petitioner's case in this Honorable Court is wholly predicated upon presumptions of law, based on the one hand upon contentions of fact not supported by the record and foreclosed against it by the findings and holdings of the courts below, and, on the other hand, upon "assumptions" of fact and law of even lesser dignity.

The word "assumptions" is charitably used, because so adroitly insinuated and so boldly urged as to confuse a court unfamiliar with the record.

The presumptions of law urged by petitioner were rebuttable, and were wholly rebutted—as disclosed by the record, by the findings and conclusions of the trial court and by the opinions of the Honorable Circuit Court of Appeals.

Petitioner's "assumptions" of fact are altogether essential to the presumptions urged by it, but are founded upon no record evidence the court could consider competent or believe and certainly find no comfort in the findings and holdings of the courts below. Petitioner's "assumptions" of law are unsupported by any applicable decision of the courts of Texas, and the cases cited by it in support of its assumption of legal title to the land in controversy, in so far as at all applicable to the facts of the instant case, when fully and fairly presented do not support petitioner's contention, as we believe will be adequately disclosed under section I of respondent's brief, following.

Petitioner's major "assumption" in this Court is that it was and is the owner of the legal title to the land in controversy. When this "assumption" is shown to have no support in the record or at law, petitioner's case in this Honorable Court presents neither proposition, point or pertinence.

Since effective brevity is the sine qua non of respondents' undertaking herein, in this behalf respondents will accompany the discussion of each point urged in the summary of their argument with a statement of the relevant facts and issues of the record, in addition to their reference to and adoption of the opinion of the Honorable Circuit Court of Appeals for their statement of the case.

Petitioner introduced in evidence (R. 95 to 108, inclusive) its chain of title, including therein all of the partition deeds in question, the patent to the Thomason Survey and the deed to Louisa Rogers, the origin of the partitioned estate in question herein, and (R. 138) its original oil and gas lease—its subsequent so-called correction lease having been by the trial court held for naught and void because secured by false-representation and fraud and without consideration. (Findings of fact, par. 17, page 68; paragraphs 4 of Conclusions of Law, page 71 of Record).

I.

That the descriptions in the instruments of Petitioner's chain of title, alone and irrespective of any fact

proved or unproved upon the trial, as a matter of law, under applicable Texas decisions, bar Petitioner from any status of innocent purchaser or claim of legal title by reason of the call for adjoinder in question.

In its Amended Petition (R. 21), petitioner sets forth the origin of the description of its leasehold estate as shown by partition deed from J. W. Rogers, W. H. Rogers and F. E. Rogers to J. F. Rogers, dated February 28, 1899, as follows:

> "Situated in Gregg County, Texas, being a part of the Geo A. Thomason Survey,
>
> Starting at the N. E. Corner of Lot No. 2 which is the N. W. Corner of W. H. Rogers tract, Lot 1;
>
> Running West 440 yards to Wiley Davis N. E. corner;
>
> Thence South 880 yards;
>
> Thence East 224 yards;
>
> Thence North 310 yards at 12 deg. East of North;
>
> Thence East 154 yards to W. H. Rogers line;
>
> Thence North 572 yards to starting point, containing 68-1/3 acres, more or less."

In said Amended Petition (R. 24), petitioner states its original lease covered the above-described land, less a 2-acre tract out of the northwest corner theretofore sold by its lessors.

Further, in said Amended Petition (R. 26-27), petitioner sets forth, by metes and bounds, the description of the land in suit herein, being a tract 66.89 feet by

1883 feet lying immediately west of the west line of the land described by the distance calls in petitioner's lease and between the same and the Wiley Davis N. E. corner.

Petitioner's leasehold description above quoted, having been derived from a partition deed, not only said deed but all the deeds comprised in said partition were instruments in its chain of title.

In this action in equity to remove cloud, petitioner prays for possession, and the record does not disclose that at any time since the date of the partition aforesaid have either petitioner or its lessors been in possession of the land in controversy herein.

It is admitted in this case that the course-and-distance calls alone, in petitioner's instruments of title, do not include the land in controversy herein.

It is elemental that petitioner was and is charged with notice of the laws of Texas. Further, it is fundamental that petitioner was charged with notice of the facts revealed in its chain of title, this being the essential purpose of registration. Therefore, petitioner had notice that if the initial call in its lease and supporting deed did not reach the Wiley Davis northeast corner, such corner was west of the point called for at 440 yards.

Petitioner further had notice from such description that any distance whatsoever west of said 440-yard call would throw the west line of its description west

of its southwest corner as called for directly south of the end of said initial call. It had notice further that displacing said southwest corner westwardly would likewise displace all the other lines and corners of its lease to the extent of such westward displacement, and without exercising further presumptions of adjoinder would make it impossible by such description to reach the beginning point called for therein, as declared in the findings and holdings of the courts below. (R. 70-72, and 334).

Petitioner therefore had notice further that the aforesaid displacement in the lines and corners of its description would displace the juncture of many of its lines and corners with lines and corners of contiguous calls of the deeds to the adjoining lots in said partition, in their relation to its own partition deed description—all of which partition deeds as well as all former deeds in its chain of title were instruments of which it was required by law to take notice, as were recognized by petitioner in introducing the same at the trial, under Exhibits No. 1, (R. 95); No. 2 (R. 98); No. 3 (R. 99); No. 4 (R. 101); No. 5 (R. 103), latter being deed into Louisa Rogers, whose said estate was partitioned by the following deeds among her heirs: Exhibit No. 6 (105); No. 7 (R. 106); No. 8 (R. 108); No. 15 (R. 138); being petitioner's oil and gas lease, and many others.

In other words, petitioner had notice from its chain of title that if Wiley Davis northeast corner was not at 440 yards west from the beginning point, the call

for such corner would therefore displace all of the other corners and lines of its description, as well as disrupt the harmony, unity and junction of the contiguous lines and corners of said description with those of the adjacent partitioned lots.

Further, petitioner had notice that if, in addition to displacing the lines and corners of its own lease, such call for adjoinder likewise displaced the common corners and lines thereof with corners and lines of the contiguous lots of the partition, it thereby created or exposed areas and tracts of land not possible of inclusion, by presumption or otherwise, in either adjoining lot of the partition, and therefore that applying such call for adjoinder would create such irregularties in the partition itself, as well as the description of its lease, as would authorize the construction of its description by reversal of its calls and applying them in order from last to first, and that when this is done such adjoinder thereby was and is shown to be impossible of application on the ground and is eliminated as a matter of law, thus avoiding all the divergent inconsistencies above enumerated and harmonizing all of the distance calls of the J. F. Rogers deed, not only with each other but with all the contiguous lines and corners called for in the deeds to the other parcels or lots in said partition.

From all the foregoing facts, petitioner had and has further notice that the distance calls of its lease describe all the acreage it bought and paid for, and that any claim asserted by it to legal title to land beyond

and outside of such distance calls is unsupported by law, as being legally not in contemplation in its purchase and therefore as a matter of law wholly without consideration.

Respondents assert that under the above-stated undisputed facts the initial call in said partition deed to J. F. Rogers and in petitioner's lease, to-wit, "Running West 440 yards to Wiley Davis N. E. corner", can convey the legal title to the land in controversy to petitioner, as an innocent purchaser for value and without notice or otherwise, only if ignorance of the law of Texas as to such calls for joinder can constitute a predicate for such presumption, inasmuch as the law of Texas is thoroughly established, by abundant decisions and holdings of our Supreme Court, in cases at law that a call for adjoinder which displaces all the other lines and corners of a survey must, as a matter of law, be ignored as a mistake.

The deed and lease description in controversy reveals upon its face that carrying said initial call 66 feet beyond the called distance of 440 yards displaces the southwest corner of said survey by 66 feet; displaces the corner established by the call "East 224 yards"; displaces the corner established by the call "North 310 yards at 12 deg. East of North", and, without indulging another presumption, displaces the next call "East 154 yards to W. H. Rogers line", and displaces the beginning corner, inasmuch as without indulging a presumption it is impossible to reach the W. H. Rogers line and conse-

quently impossible to reach the beginning point, as stated in the opinion of the Honorable Circuit Court of Appeals. Further, as found by the trial court (Findings, R. bottom of page 70, and pp. 71 and 72), a strip similar to the one in controversy here would be left between the J. F. Rogers tract hereinbefore described and the tract partitioned to J. W. and F. E. Rogers, and since this strip adjoins the J. F. Rogers tract, or Lot 2, and also adjoins the J. W. and F. E. Rogers tract, being the third Lot in said partition, it would be impossible to determine by presumption to which of said lots said strip must be added as a matter of law, as insisted by petitioner must as a matter of legal presumption be done with regard to the land in controversy herein. Further, without indulging a presumption at the end of the call "East 154 yards to W. H. Rogers line" a strip of the same width as the tract in suit herein would be left between the J. F. Rogers tract, Lot 2, and the W. H. Rogers tract, Lot 1, extending the full length of the east line of the J. F. Rogers tract, which strip also must be allocated by legal presumption to said Lot 2 or to said Lot 1. Further, the strip in controversy in this suit extended all the way from the north line of the partitioned Rogers estate 320 acres to the south line thereof, and there was likewise left out of the partition a strip of land of equal dimensions to the tract in suit herein on the west of the third lot, partitioned to J. W. and F. E. Rogers, which strip must also be allocated by legal presumption.

Further, as shown by the said partition deeds in petitioner's chain of title, when the distance calls in petitioner's lease and the J. F. Rogers deed are followed and the call for adjoinder with the Wiley Davis N. E. corner is ignored, the southwest corner of the J. F. Rogers tract and of petitioner's lease is a common corner with the northwest corner of Lot 3, partitioned to J. W. and F. E. Rogers, whereas if the call for adjoinder with Wiley Davis N. E. corner is observed, these corners are absurdly displaced and separated. Further, it is significant that the description in the deed to J. W. and F. E. Rogers, beginning at the southeast corner of the partitioned original Rogers estate, arrives at a northwest corner which is identical with the southwest corner of the distance-call description of the J. F. Rogers tract, the description of which begins at the northwest corner of Lot 1, approximately in the middle of the north line of the original Rogers estate; that this corner having been marked on the ground for more than thirty years by an old pinion and gear wheel of large dimensions and for that period recognized generally in the vicinity as the original partition corner in question, (R. 335), any inquiry or investigation that might have been made by petitioner pursuant to the multitudinous evidences of ambiguity exhibited on the face of the instruments of its chain of title, would have revealed to it beyond question that its lease and deed description did not and were never intended to cover the land in controversy herein.

Therefore, from all the foregoing facts and patent implications, petitioner had notice that under the well-established law of Texas such call for adjoinder must, as a matter of law, be ignored as a mistake, as it so obviously was, on the face of the instruments in its own chain of title, of which it had notice, and controlling effect given to course and distance from known and undisputed corners of its title description.

This doctrine, so frequently reiterated of late by our Supreme Court, is not new but, as will be disclosed, is reflected in the decisions of many decades. It is not in anywise in conflict with the cases cited by petitioner in behalf of the presumption urged by it, as will clearly be manifest when the differentiating elements of petitioner's decisions are not omitted from the presentation.

A recent expression of our Supreme Court on this point is reflected by the opinion in **State v. Sullivan**, 92 S. W. (2d) 228 (233), as follows:

> "* * where the facts conclusively show that the surveyor through mistake or by conjecture called for the adjoinder, the call for adjoinder does not control over course and distance, even though the line or corner called for was marked. In such situation the call for adjoinder will be rejected, as inserted by mistake, and controlling effect given to course and distance from known and undisputed corners, when under the facts of the particular case such construction of the survey is **'most consistent with the intention to be derived from the entire description'. This method of construction by the rejection of a call for adjoinder inserted by mistake**

is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible." (Citing numerous cases.)

The description in the J. F. Rogers deed in question in the instant case being an integer or unit of a partition, the sub-quotation "the entire description" above referred to applies not only to the J. F. Rogers deed to Lot 2 in said partition, but of course to all the deeds thereof, all of which were instruments in petitioner's chain of title.

In **Humble Oil & Refining Co. v. State**, 104 S. W. (2d) 174 (179) (Tex. Civ. App.), approved by the Supreme Court (Writ refused), the Court states:

> "The adjoinder rule has no application where the facts conclusively show that the surveyor through mistake or conjecture called for the adjoinder, **and in such cases the call for adjoinder does not control the call for course and distance, even though the line or corner called for was marked.**" (Citing previous quotation from State v. Sullivan, supra) • • •
>
> "**This method of construction by the rejection of a call for adjoinder inserted by mistake is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible.**" (Citing Wilson v. Giraud and numerous other cases).

Likewise, and repetitiously monotonous, is the opinion of our Supreme Court in **Blake v. Pure Oil Co.**, 100 S. W. (2d) 1009 (1012), in which it will be noted that

even the limited quotation below reflects a surprising identity with the facts in the instant case—in fact almost what our older generation called a "hoss case":

> "• • • it is our opinion that such mistaken call should be rejected and the block constructed by course and distance from the southeast corner of the Moore Survey, located in the position where Starr and his surveyor believed it to be• • • because under the facts in evidence such construction **is most consistent with the intention to be derived from the entire description and harmonizes the other terms of the field notes.** This construction is the same in effect as a construction of block 7 by course and distance from its southeast corner on the undisputed west line of the Walling survey, the location of which southeast corner is proven by evidence hereinafter discussed. **When block 7 is thus constructed, the lengths and courses of its lines are the same as those given in the field notes and shown on Starr's map, it has the acreage called for in the deed and marked on the map, and it does not conflict with block 5, block 6, or block 8, or with the Juan Prado Survey."**

And on and on, back through the years, these metronomic utterances of our Supreme Court meter the harmony of the law of Texas with our record facts here.

We would not burden this Honorable Court with overfamilar doctrine, or naively imagine it born of us. To the end of brevity and for the edification of any who might be interested in the more recent genealogy of this expression in our State, we list below some of the cases more frequently cited in this behalf by our Supreme Court itself, in addition to those above presented:

Wilson v. Giraud (Sup Ct.) 111 Tex. 253, 264, 231 S. W. 1074, 1078;

Porter v. State (Tex. Civ. App.) 15 S. W. (2d) 191, 193;

Caswell v. Faulk (Tex. Civ. App.) 97 S. W. (2d) 341, error refused;

Finberg v. Gilbert, 104 Tex. 539, 547, 141 S. W. 82;

Gerald v. Freeman, 68 Tex. 201, 204, 4 S. W. 256;

State v. Talkington (Tex. Civ. App.) 274 S. W. 314;

Cox v. Finks (Tex. Civ. App.) 41 S. W. 95, 99;

Gilbert v. Finberg (Tex. Civ. App.) 156 S. W. 507;

Lafferty v. Stevenson (Tex. Civ. App.) 135 S. W. 216, 220.

Many of the more recent of these declarations of our Supreme Court were cited in the opinion of the Honorable Circuit Court of Appeals in behalf of the admissibility of the evidence of the survey and attendant facts, as it seems most of these cases were met with the same familiar obstruction urged here— the asserted conclusiveness of rebuttable presumptions in the face of obvious ambiguity of description. But fortuitously it seems we are not under urgent need of resorting to the confirmations the trial evidence abundantly afforded, but find ample support for our point from the inescapable purport of the chain of title introduced by petitioner.

Under the ample and authoritative decisions we have quoted and those cited thereunder, this chain of title reflects all the facts our Texas Supreme Court required, of the evidence admitted by it in its uniformly similar cases, to hold petitioner could not have been an innocent purchaser for value without notice, on its urged presumption of adjoinder. As so well indicated by these decisions, the very inharmonies, discrepancies and unresolvable presumptions thereby raised at other points in the partition descriptions enjoin the application of such presumption. Petitioner had notice of these facts from it own title and thereby is precluded here to urge its consequently unfounded claim of legal title to an estate not included in its title description, not alleged to have been represented as belonging with it and, as a matter of law, impossible of inclusion in it by presumption without wrecking the very title it here gratuitously seeks to expand and for which alone it paid value. Under its chain of title, not only was petitioner's urged presumption rebuttable. As a matter of law it was impossible of application.

But, building presumption upon presumption, in the absence of factual support, petitioner urges it is presumed partitioners intended to divide all the land in their common estate and not leave unpartitioned a strip of the dimentions in suit extending the full length of their common west line from their north line to the southernmost. Such a presumption may frequently be warranted, but in Gill v. Peterson, 126 Tex. 216, 86 S.

W. (2d) 629 (633), our Supreme Court upon opposite facts but apposite principle presents the rule applied in Texas on such presumptions:

> **"Moreover, these rules, like other rules for construction of grants and for ascertainment of boundaries, as has so often been said, are controlling only when under the facts of the particular case they best enable the Courts to arrive at the intention of the parties."**

And as said by the Honorable Circuit Court of Appeals:

> **"* * It is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield."**

The facts disclosed in petitioner's chain of title alone reveal that to indulge its urged presumptions in behalf of its thus anticipated gratuity and its generous impulse to have this Honorable Court eliminate one-half of the strip left unpartitioned, will create other strips, ambiguities and irregularities most of which no presumption can resolve, eliminate or cure, as we have hereinbefore shown.

From a consideration of the point and law here presented it will be found that the interpretation of the descriptions in the partition in question, including that of petitioner's leasehold estate, from petitioner's chain of title alone, by the rule we have announced and supported herein by abundant holdings of our Supreme Court, arrives at the identical result reached by the trial court and the Honorable Circuit Court of Appeals

from the trial evidence, inasmuch as it is not contended in this case that the course-and-distance calls in the description of petitioner's leasehold estate and supporting deed include the land in controversy herein.

Petitioner's Cases on this Point

As we have hereinbefore stated, petitioner's major "assumption" in this Court is that it was and is the owner of the **legal title** to the land in controversy. When this "assumption" is shown to have no support in the record or at law, the petition and brief of petitioner in this Honorable Court present neither proposition, point nor pertinence.

In considering petitioner's cases on this issue, it must be borne in mind petitioner is here suing for **possession** as well as title, and that the record does not disclose that at any time since the date of the partition aforesaid has either petitioner or its lessors had possession of the land in controversy herein.

On this point, petitioner cites three cases in support of its claim of legal title on the presumption of adjoinder urged by it, being the cases of Swann v. Mills, (Tex. Civ. App.) 219 S. W. 850; Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, and Miller v. Southland Insurance Company, 68 S. W. (2d) 558 (Tex. Civ. App.). As will be noted, none of these decisions, when presented so the Court may have the benefit of the preponderantly important elements omitted from the quotations and

references set forth by petitioner, support petitioner's "assumption" and claim of legal title based thereon.

In its petition, page 35, petitioner cites Swann v. Mills and quotes as follows from the decision:.

> "It will be observed that in both deeds—that from Ingraham to Bellamy and from Bellamy to Mills—the west boundary line of the Neil survey is called for, and is the first call mentioned, as the west boundary line of the land conveyed. Neither of those deeds calls for any objects, natural or artificial, which conflict with the true Neil line as originally established. * * *"

By the asterisks here inserted, petitioner omits the following rather pertinent language:

> "We then have field notes in which **there is neither a patent or a latent ambiguity as to that boundary.** If we rely upon the language which the parties incorporated in the written conveyances introduced in evidence, **and which are not attacked as incorrect,** Bellamy and Mills both purchased to the true Neil west boundary line. The rule is well settled that in such cases the written description controls.
>
> "In the case of Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, Justice Gaines used this language:
>
> > 'If **the calls in a grant,** when applied to the land, **correspond with each other,** parol evidence is not admissible to vary them by showing that in point of fact they were not the calls of the survey as actually made. **But if, when so applied, they disclose a latent ambiguity—that is to say, they conflict with each**

> other—then extrinsic evidence may be resorted to in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey.'
>
> "The same proposition is announced in the following cases: Brodbent v. Carper, 100 S. W. 183; Anderson v. Stamps, 19 Tex. 465; Williams v. Winslow, 84 Tex. 371, 19 S. W. 513; Thompson v. Landon, 87 Tex. 254, 28 S. W. 931; Jamison v. N. Y. & L. T. Co., 77 S. W. 969; Watts v. Howard, 77 Tex. 71, 13 S. W. 966; Robertson v. Mosson, 26 Tex. 248.
>
> "It may be that in a contest between Ingraham and Bellamy, or one claiming under Bellamy with notice, Ingraham would, upon a proper showing, have a right to restrict the purchaser to the line surveyed by Pogue. **But in order to do so he would be required to allege and prove a mistake in the field notes of his deed.**" (Emphasis ours).

Here petitioner resumes his quotation of this opinion, as follows:

> **"Whether Ingraham intended to do so or not, he executed a deed which conveyed to the true west boundary line of the Neil survey, and thereby invested his grantee with the legal title to all he described. Whatever interest remained in him by reason of a mistake in thus describing the land was an equity, of which there was no written record. One purchasing from Ingraham's grantee without notice of that equity would acquire title to all the land described in the deed."** (p. 852).

It must further be noted that the line in dispute in the above case was the west boundary line of the Neill

Survey, which was the "beginning call" in both deeds involving the descriptions in question in the Mills title, and therefore, as stated by the Court in the portion of the opinion omitted from quotation by petitioner, **no patent or latent ambiguity was in question** (219 S. W. 851), and, further, that **Mills was in possession,** suing Swann for trespass and for $50.00 damages because of Swann "cutting and destroying a wire fence" erected by Mills, as well as other damages. (219 S. W. 851).

We submit that in omitting the portion we have been obliged to supply to manifest the true holding of the court in Swann v. Mills, petitioner in the instant case has presented as the law of Texas a holding exactly reverse in substance and effect to the plain and patent intent of the court in the distinction it so carefully made in its opinion. The part of the opinion so withheld from the Court here was all that was needed to exhibit the consistent uniformity of our courts in this behalf. So revered was Justice Gaines of our Supreme Court that both courts and counsel prized his decisions as much for the name they bore as for their authority and dependable substance, and it is to us understandable that when the Honorable Justice in Swann v. Mills was obliged to write an opinion which might be interpreted to hold other than the eminent Gaines, he was careful to distinguish the facts in the language of Justice Gaines himself.

Thus, when the full facts of petitioner's cited cases are presented, as we have set them forth above, it is

seen how the stone which the builder rejected has indeed become the head of the corner.

And that is the kind of emasculated authority upon which petitioner has founded its "assumption" of legal title, by which it seeks in this Honorable Court to throw the burden of its case upon respondents, and upon which it predicates error of the Honorable Circuit Court of Appeals in a monumental structure of sound and authoritative cases—but wholly inapplicable to the instant case.

We will now see how much legal title petitioner derives from Garrison v. Crowell. We apprehensively note it does not purport to quote from the short and substantial opinion of Justice Gaines in this case, but on page 38 of the petition presents an outline of the case as follows:

> "The early case of Garrison v. Crowell, 67 Tex. 626, 4 S. W. 69, is therefore directly in point. There appellant and one John H. Stephens were claiming adversely a tract of land in Montague County, Texas. They compromised their claims, in pursurance of which appellant conveyed to Stephens a portion of the tract."

At this point we are moved to consult the opinion of Justice Gaines and find a significant omission wherein we observe the Court did not fail to note:

> "Sometime after the conveyance, **Stephens moved his fence upon the more Southern line, and took actual possession of the disputed land.**"

We may now trust petitioner's narration a little further:

> "Stephens subsequently sold the land to the defendant Crowell. Appellant sued Crowell claiming that they were mistaken in supposing that the southwest corner of the land was in the line of the Davis Survey for which his deed to Stephens called, and that the call of south 889 varas to the southeast corner of the Hodges survey on the north boundary line of the Davis Survey did not reach the Davis Survey by some 79 varas, and that the 79 varas were not covered and included by the deed. This is similar to the case at bar, the call west 440 yards not reaching the Wiley Davis northeast corner by approximately 66 feet. There, as here, the strip between the called distance and the adjoinder called for was the land in controversy. Our Supreme Court held that such mistake would not avail appellant as against Crowell, an innocent purchaser."

And so ends petitioner's narrative of the case; but again it appears we cannot safely ignore these further unmentioned comments of Justice Gaines:

> "If it be determined that Crowell is a bona fide purchaser **without notice**, of the land in question, the judgment must be affirmed, without reference to any other question presented by this appeal; and we have no doubt that he must be so held. It does not appear that he knew that the distance of the west line called for in the deed would not reach the Hodges corner and the Davis line. Therefore **there was nothing on the face of the conveyance to put him upon inquiry as to any claim upon part of appellant. He found Stephens in possession**

> **of the premises in controversy, holding under a duly recorded deed from appellant himself, which, according to well established rules of construction, embraced the land so possessed. He paid his money upon the faith of a conveyance which imported an absolute title in his vendor at least against appellant in this case, and we fail to see any reason why he should be excepted from the rule which protects the innocent purchaser for value against the claim of his adversary, which was unknown to him at the time of his purchase."**

From the record in the instant case, it does not appear that petitioner's lessors were in possession under a deed calling for the line under fence, or in fact that they ever had any character of possession of the unfenced land in controversy in this case. To instance that the fact of possession was held by Justice Gaines to be the critical distinction in the case of Garrison v. Crowell, we find he goes on further to differentiate Garrison's cited authority of Houston v. Sneed, 15 Tex. 307, as follows:

> **"The case of Houston v. Sneed, 15 Tex. 307, cited by appellant's counsel, does not sustain the proposition submitted by them upon this point. In that case Sneed was held not to be an innocent purchaser, because at the time of his conveyance Houston was in actual possession of the land up to the disputed line. This was considered as constructive notice to him of Houston's claim.** But the court says: 'Had there been no settlement up to this agreed line, and no notice to him of it, he might have insisted upon the line originally established between Horton and McKinney, called for by his

deed.' It is evident that, in so far as the opinion bears upon this case, the authority is against appellant, and not in his favor."

Thus, when the facts presented in this opinion are adequately set forth we find that defendant Crowell bought from Stephens who was in possession of the land up to the disputed line under a deed from plaintiff, Garrison, calling for such disputed line. Under this state of facts, the courts of Texas appear to have uniformly supported the presumption of the legal title following such possession. This certainly is no parallel to the instant case, and cannot be considered in relation thereto.

Petitioner's third case in behalf of its asserted legal title, that of Miller v. Southland Insurance Company, 68 S. W. (2d) 558, when the opinion is consulted, reveals the same state of facts set forth above in Garrison v. Crowell, which it cited. In the Miller case, the court says:

"M. K. Miller, the borrower, was in possession of the entire lot from the railway south to the south boundary line. Miller had constructed buildings along the whole of the west line of the property. Appellant's representatives inspected the property and there was nothing in its physical aspect or in its occupancy which could have put the Insurance Company upon notice of any claim adverse to M. K. Miller. Under these circumstances and the authority of the case cited, we hold the insurance company, as a bona fide lienholder without notice, is protected against the adverse claim of title of appellants arising out of the boundary dispute."

The foregoing three cases are the only cases cited in the petition or petitioner's brief as supporting its claim and "assumption" the legal title. The only Supreme Court case cited by it, that of Garrison v. Crowell, when the part omitted in petitioner's quotation therefrom is supplied, is clearly against its contention of legal title. The other two cases, both from our intermediate Courts of Civil Appeals, are wholly inapplicable to the facts of the instant case. It does seem, if there were any foundation in the law of Texas for petitioner's claim of legal title, out of the multitudious cases we find bearing upon the facts presented here it ought to be able to find some supporting authority. But all the pertinent cases we have been able to find clearly hold against petitioner's contention.

In filing its suit in equity, petitioner in the beginning assumed it had the legal title, and without support of any applicable case or even supporting evidence adduced at the trial, it has built all the unwarranted presumptions and issues that plague this appeal, utterly without legal or factual basis.

These respondents, as defendants in the trial court, in their answer moved to dismiss the bill as without equity in that complainant had not in any manner established its legal title, had never been in possession of the property, and as a matter of fact in its bill in equity prayed for both title and possession. All that petitioner has ever presented in behalf of its "assumption" of legal title is its reliance upon a call for joinder

which, under the facts presented by this case and even from those of petitioner's chain of title alone, is uniformly rejected by our Supreme Court as hereinbefore shown; and all of said cases and multitudes more hold that under the facts presented here, respondents have always had and still hold the legal title to the land in controversy, as found and held by both the courts below.

II.

The description calls in the instruments of petitioner's title being shown, both on the face of such instruments and by the evidence of record, to be ambiguous, inharmonious and irreconcilable with each other, when the call for adjoinder is observed, or when an attempt is made to apply them on the ground, and petitioner having introduced evidence on its theory of the effect of the partition, which was rebuttable, neither the trial court nor the Circuit Court of Appeals erred in holding parol evidence admissible to determine the intent of the partitioners and the footsteps of the surveyor, under the applicable decisions of the Supreme Court of Texas.

The trial court, in its Finding No. 19 (R. 69) stated:

> "The Court finds as a fact that the surveyors of the Complainant testified that there was an ambiguity in the partition deed and in the lease of the Complainant when it was attempted to be applied to the ground, and, upon such admission of ambiguity, the Court heard evidence as to the

footsteps of the original survey at the time of the partition and as to the intent of the parties in making such instruments.

And in its Conclusion No. 4 (R. 70-71), the Court states:

"The Court concludes that extrinsic evidence was admissible to show that the surveyor Simmons, at the time he made the partition survey, placed a stake at a point 880 yards west of the northeast corner of the said Thomason Survey for the northwest corner of the J. F. Rogers tract, and another stake 880 yards south thereof at a point now, and for more than 30 years, located by the old gear wheel. Also, extrinsic evidence was admissible to prove that one of the stakes was removed and the gear-shaft placed where said stake was originally driven, as the Court concludes that the correction lease obtained either does not cover the 66 feet involved in this controversy or it takes in more land than it was represented to cover at the time it was obtained.

The correction lease and the original lease, separately and taken together, when application of the calls is made to the land on the ground, create an ambiguity and, when taken in connection with the description of the partition deed to J. F. Rogers, create an ambiguity. If effect is given to the call "thence west 440 yards to the northeast corner of the Wiley Davis tract; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. E. of north; thence East 154 yards to W. H. Rogers line; thence North to the beginning, it would leave out a strip of land 68 feet wide west of the J. F. Rogers old fence, along the

line North 310 yards at 12 deg. E. of North; for, if you run from the southeast point, as claimed by the complainant herein, at a point 880 yards south of the northeast corner of the Wiley Davis tract of land, and then run East 224 yards (the call in the original partition deed and in the original lease to W. P. Chandler and in the assignment from Chandler to the complainant), there will be 68 feet between J. F. Rogers' fence and the call distance; then to run north 310 yards at 12 deg. east of north, there will be 68 feet between the line as called for and as surveyed and the fence line of the Rogers tract of land. This ambiguity, from all the facts, compels the conclusion that the intention of the parties was not to take in the 68 feet west of the gear wheel in controversy, and that it was purposely left out of the partitioned land. * * * In other words, if the complainant were entitled to rely on the call to the Wiley Davis corner, at the north, it would be confined to the call of 224 yards east from the point 880 yards south of the said corner, and a strip of 68 feet would be outside the calls of their lease along the east side thereof."

And the Circuit Court of Appeals, in its original opinion, in reviewing the evidence presented to it said: (R. 333-334)

"On the other hand, if the north line of Lot No. 2 is not stopped at 440 yards but is continued about 66 feet to Wiley Davis' N. E. corner, which was a known point in 1899 and ever since, and if the survey is continued thence, the beveled gear shaft will be missed at the southwest corner by 66 feet, the west lines of Lot. No. 1 will not be reached by that distance, nor will the beginning point be."

That such ambiguity completely overcomes any presumption of innocent purchaser on call for adjoinder, as urged by petitioner, as well as any legal title predicated upon such call for adjoinder, is shown by Justice Gaines in the case of **Johnson v. Archibald**, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27, (1890) in his Texas Supreme Court opinion quoted in petitioner's cited authority to the contrary, Swann v. Mills, in differentiation therefrom. Justice Gaines said:

> "If the calls in a grant when applied to the land correspond with each other, parol evidence is not admissible to vary them, by showing that in point of fact they are not the calls of the survey as actually made. **But if when so applied they disclose a latent ambiguity—that is to say, if they conflict with each other—then extrinsic evidence may be resorted to in order to determine the conflict and to show the land actually intended to be embraced by the calls of the survey.**"

That the Court in petitioner's case of Swann v. Mills considered this the law as applied to the facts of the instant case is thoroughly evidenced by his quotation of the above in differentiating the facts in the Swann case, at the point in the opinion where petitioner omitted it.

It will be seen the Court in petitioner's case of Swann v. Mills went on further to differentiate the facts before it from those of the Supreme Court case referred to by it above. In further language omitted in petitioner's quotation the Court emphasized:

"We then have field notes in which there is neither a patent or a latent ambiguity as to that boundary* * * and which are not attacked as incorrect."

Thus there can be no doubt, by reason of its careful differentiation, the Court in Swann v. Mills considered the law applicable to the facts of the instant case as we have presented it. The character of description conveying an unassailable legal title, against which evidence cannot be introduced to prove the actual survey, is exactly that character of description Swann v. Mills passed upon— a description without ambiguity or uncertainty, either patent or latent, "not attacked as incorrect", the calls of which, whether or not following the footsteps of the surveyor, delineated with certainty a definite tract of land about the location of which upon the ground there was absolutely no question.

In **Wilson v. Giraud**, 111 Tex. 253, 231 S. W. 1074 (1078), (Supreme Court), cited by the Circuit Court of Appeals in its original opinion in this behalf, the same rule is held forth:

"Once testimony is adduced to establish an inconsistency in field notes, parol evidence which throws light upon which call is true and which call is false is admissible. The purpose of admitting the parol evidence is not to override that which is written, but to properly interpret it. Where it is impossible to give effect to all that is written, effect will be given to that which may be found to be true."

Likewise, in Blake v. Pure Oil Company, 100 S. W. (2d) 1009, (1012), (Tex. Com. App.)—

> "A call for an adjoinder is ordinarily given controlling effect over a call for course and distance, but when it is proven that the call for adjoinder was made by conjecture or under a mistaken belief as to the location of the adjoinder, such call does not control over course and distance. In such situation the call for adjoinder will be rejected as inserted by mistake, and controlling effect given to course and distance from known or undisputed corners, when under the facts of the particular case such construction of a survey is most consistent with the intention to be derived from the entire description.
>
> * * * * *
>
> "But parol evidence is admissible to show where on the ground a survey or a line of a survey was actually made, when the calls in the field notes or deed are conflicting or ambiguous, or when the effort to apply the description to the ground gives rise to ambiguity. * * * The description in the deed conveying Block 7 is not on its face ambiguous, but as has been shown serious conflicts and irreconcilable ambiguities arise when effort is made to apply the description to the ground."

We see no virtue in multiplying uniformities, but to the same effect are the decisions in the cases listed below, many of which were cited on this point by the Honorable Circuit Court of Appeals, and some of which were quoted by us in connection with our Point I:

State v. Sullivan, 127 Tex. 525, 92 S. W. (2d) 228;

Humble Oil & Refining Co. v. State, 104 S. W. (2d) 174 (179) (Tex. Civ. App.—Writ refused);

Gill v. Peterson, 126 Tex. 216, 86 S. W. (2d) 629;

Caswell v. Foulk, 97 S. W. (2d) 341 (W. E. refused);

Porter v. State, 15 S. W. (2d) 191 (193) Tex. Civ. App.);

Milton v. Campbell, 171 S. W. 251, (Tex. Civ. App.).

The only cases presented by petitioner upon this point were Swann v. Mills, Garrison v. Crowell and Miller v. Southland, discussed and differentiated by respondents in the latter portion of their Point I, pages 19 to 28, this brief, and they are there shown, when fully quoted, to be wholly inapplicable to the facts of the instant case. We have been unable to find any case supporting the rule urged by petitioner from their misstatement of these cases. If they ever were the law of this State on this point, which we deny, it is certain that the numerous cases of our Supreme Court itself, recently decided, as above quoted and referred to, effectually relegate them to the realm of abandoned doctrine. But it does appear that, as presented, they mislead the Honorable Circuit Court of Appeals, who apparently accepted them as submitted by petitioner; nevertheless said Court cited abundant and more recent authority of our Supreme Court to the contrary. As we have before repeated, without these cases petitioner's brief and petition are without proposition, point or pert-

inence—it simply has presented no case for consideration here.

If the courts below both hold that under all the facts presented before them the surveyor in making such partition deliberately, upon request of the partitioners, left out of the partition a strip 66 feet wide along the full length of the west line of the partitioned land, and in witness of such fact drove a stake marking the southwest corner of petitioner's leasehold, the said Lot Two, and the northwest corner of Lot Three, and that some few years thereafter said stake was replaced by a large pinion shaft and gear wheel which has marked such corner for over thirty years as the reputed division point between said Lots Two and Three and between both of them and the land in controversy herein, we cannot understand, if the evidence supporting such findings and holdings was admissible (and we have shown it was), how contrary allegations can stand before this Honorable Court as the sole support of legal propositions which thus can have no bearing upon this case.

The old pinion and gear-wheel so often mentioned in the record, findings and decisions in this case was located in the center of the west line of the partitioned land. That the stake replaced by it was located as the result of a meticulously careful survey is disclosed by the testimony regarding the work, over thirty years later, of two modern surveyors, who with modern precision instruments measured from an agreed division

point in the center of the east line of said partitioned land to the old pinion and gear wheel. Surveyor Boyette reached the pinion and gear wheel in exactly 880 yards. (R. 237). Surveyor Hackney reached it within "one-hundredth of a yard"—less than a third of an inch. (R. 231). Could such a marker be there as the result of accident or chance and have remained undisputed and generally recognized in the vicinity as marking such corners for more than thirty years?

Thus respondents have shown that, on the ambiguities indicated, the trial court followed the established law of Texas with regard to the admission of the evidence protested by petitioner here, and that the evidence so adduced, as found and held by both courts below, and their decisions predicated thereupon, reflect the identical result arrived at from petitioner's chain of title alone, considered in the light of the law of Texas as presented under our Point I.

Yet, despite the exhibited *fata morgana* of petitioner's legal title, we have yet to argue that we did not have to prove petitioner, astride this tenuous delusion, is not and was not an innocent purchaser for value of this land it obviously did not lease, if for no other reason than the fact its lessors have never owned it.

Many of the petitioner's propositions involving the issues and evidence concerning the survey in question cannot properly be considered or discussed separately with adequate comprehension of their full implications. Individually, they present perhaps grounds for argu-

ment, but considered jointly they destroy themselves, as disclosed by the anomalous absurdity evolved when they are considered together. Petitioner urges upon this Court:

1. That the call for adjoinder in question, irrespective of any other fact or notice revealed in its chain of title or otherwise, constituted it the owner of the **legal title** to the land in controversy;

2. That because it had pleaded this asserted legal title, under the law the burden of proof was upon respondents to disprove the same—

but

3. That as a matter of law respondents could not introduce any evidence to disprove petitioner's evidentially unsupported and hence unestablished plea.

If these propositions can be sustained in this Honorable Court, all that could hereafter be required of a complainant in a Federal Court in this character of boundary suit is to plead his asserted, even though unfounded, legal title and rest his case.

Petitioner introduced abundant evidence in an effort to prove its theory of the survey and the intent of the partitioners, as disclosed thereby, but in this court, in a suit in equity, asserts that as a matter of law respondents are not permitted to present any evidence in rebuttal as to the original survey as actually made.

If this is law, respondents feel a greater urge for equity than when they pleaded petitioner had an adequate remedy at law. In fact, they feel the need of ecclesiastic relief.

III.

That petitioner's claim of legal title by presumption based upon an abutting road is not supported by evidentiary facts essential to such presumption and is contrary to the express findings and holdings of the Courts below. (Responsively vital to all Propositions of Petition and all Points of Petitioner's Brief).

The facts and law applicable thereto, including quoted findings, conclusions and decisions of the courts below, comprised in the foregoing points of respondents brief, all are important to a consideration of the above-stated Point III, and are adopted as a part of and in connection therewith.

In addition thereto, they quote as follows from paragraph 7 of the Findings of Fact (R. 63):

> "In making a survey on the ground for tract No. 2 J. H. Simmons began on the north line of the Thomason Survey at a point 440 yards west of the northeast corner of said survey, being at the point he had determined as the northwest corner of tract No. 1, and ran a line west along the north line of said Thomason Survey a distance of 440 yards and there set a stake for the northwest corner of Lot No. 2, and told the four Rogers boys, who were accompanying him on the survey, that there was

a chain left between the point where he had stopped and set the stake, after measuring 880 yards from the northwest corner of said Thomason Survey and the northwest corner of their land, after measuring 880 yards from the northeast corner of the survey it was about one chain (66 feet) to the northwest corner of their land, which corner, from a fair inference from the evidence, was the northeast corner of the Wiley Davis land, though the surveyor Simmons did not mention the Davis corner to the Rogers boys at the time of the survey; neither did he survey to said corner; nor did he endeavor to locate said corner at the time he was making the partition for the Rogers boys. The four Rogers boys, viz., W. H. Rogers, J. W. Rogers, J. F. Rogers and F. E. Rogers, who were with said J. H. Simmons, informed him that they would leave the 66 feet out of the partition and use the same jointly and keep it like it was; the same 66 foot tract was then being used IN PART as a logging road." (Capitals ours.)

* * *

"After J. H. Simmons set the stake for the northwest corner of the Thomason survey, he measured south a distance of 880 yards and there set a stake, at a point now evidenced by the old gear wheel, placed there soon thereafter as a corner stake, where it has remained for more than thirty years."

* * *

And from paragraph 14 of said Findings (R. 67), Respondents quote:

"The Court finds that J. F. Rogers never acquired title under the partition deed executed February 28, 1899, to the strip of land situated between

a line run south from the Wiley Davis northeast corner and a line run south from a point 880 yards west of the northeast corner of the Thomason survey to the gear shaft. The Court finds that J. F. Rogers never acquired title under said deed to said strip, but that all land lying between a line run south from the Wiley Davis northeast corner and a line run south from a point 880 yards west of the northeast corner of said Thomason survey was not covered by said deed. When Mrs. L. J. Rogers and her two children made, executed and delivered to W. P. Chandler, on October 20, 1930, the oil and gas lease under which complainant claims title to the strip, said Mrs. L. J. Rogers and her children did not own the fee simple title to all of said strip of land, but said fee simple title was then owned by the said heirs of Louisa Rogers, deceased."

And from paragraph 15 of said Findings (R. 67-68), as follows:

"The Court finds that the oil, gas and mineral lease and leasehold estate of Complainant, Empire Oil & Refining Company, originally executed in favor of W. P. Chandler, dated November 18, 1930, does not cover nor include any land west of a line running north from the old bevel gear and said oil and gas lease does not cover and include the 66 foot strip situated between the line running south from the Wiley Davis northeast corner wherever situated, and a line running south from a point on the north line of the Thomason Survey 880 yards west of the northeast corner to the gear shaft, and that the West line of plaintiff's lease coincides with the East line of the Dunlap lease."

The trial court did not find or conclude anything with regard to the road in question, merely reciting that under the agreement of the heirs to leave said strip unpartitioned, as adduced in the evidence and findings derived therefrom, hereinabove quoted, and as clearly manifest in the instruments of partition themselves, the said J. F. Rogers and his heirs, lessors of petitioner, never did own the title to the land in controversy, and consequently holding they could not have leased it to petitioner, either by intent or authorized presumption.

The trial court's finding that the Rogers heirs, during the survey for the partition, told the surveyor **"they would leave the 66 feet out of the partition an use the same jointly and keep it like it was; the same 66 foot tract was then being used in part as a logging road"** will be fortified and elucidated hereinafter from the testimony of the most competent witnesses, many of them for petitioner, showing that the words **"in part"** referred to the fact that if any of said road whatsoever was upon the strip of land in controversy herein, there could not have been more than five feet of the strip included in such road, and that on the extreme western edge thereof, farthest removed from petitioner's lease. These witnesses were those who helped cut out the road in question, and most of whom testified the road was altogether upon the land of Wiley Davis, which, upon the presumption urged by petitioner would leave the title thereto entirely in Wiley Davis. Certainly there was no evidence in the record of any road abut-

ting or margining petitioner's lease at the time of the partition."

The Circuit Court of Appeals, reviewing the facts from the evidence presented to it, states (R. 334-335):

> "The court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common **for the purpose of a road.**" (Emphasis ours).

On page 22 of its brief, petitioner avidly grasps the slight misquotation of the trial court's finding at the end of the above-quoted paragraph, and proceeds to make therefrom an air-tight case of presumptive conveyance by reason of an abutting road, but we believe the paragraph, taken as a whole, even granting the misstatement of the finding as correct, would merely reflect an agreement of the heirs to retain common ownership of the land in controversy, whether or not it was intended to be used as a road, and J. F. Rogers being a party to such stated agreement and such agreement being evidenced by the instruments of partition as a whole, by the large pinion and gear-wheel separating the partitioned land from that left unpartitioned, which, as the evidence amply discloses replaced the stake set by the Surveyor at the time of the survey and agreement in question, and the further fact that J. F. Rogers and his heirs have never claimed indepen-

dent ownership of such undivided tract all serve to emphasize the common ownership of the land in controversy by the heirs of Louisa Rogers, and that the same was not thereby, by presumption or otherwise, conveyed to J. F. Rogers, and that, as held by both courts below, neither J. F. Rogers nor his heirs have ever owned the same exclusively as their own fee-simple estate.

Quoting from the original opinion of the Circuit Court of Appeals further, we find, (R. 336):

> "Appellant strongly argues that although it be established that the call for the Wiley Davis corner does not belong in the deed, under settled rules of law the conveying of the land adjoining a road will carry the grantor's title to the servient fee up to the center of the road, and if the grantor has no land beyond the road, the grantor's title to its further edge will pass. Such is the general rule applied both to highways and streets and alleys, non-navigable streams and railroad rights-of-way. 8 Am. Jur., Boundaries, Secs. 36, 39, 22, 25; 11 C. J. S., Boundaries, Secs. 31, 35, 45. It is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. **But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip. There was in 1899 no highway or street or alley covering the strip in question. A**

highway ran east and west through the land to be partitioned near its center. The Rogers brothers had run a sawmill on their land, and had hauled logs along the line of Davis to this highway. It was not a publicly worked way, or an established road. About this time, the date not being clearly fixed, Davis wished to confine the travel across his place, and he testified he gave fifteen feet along the east edge of his land for a north and south road. Several witnesses say they helped cut the road out fifteen or twenty feet wide, cutting the line trees on the Davis line because they were in the road."

* * *

"The land, as we understand, was mostly in woods. The actual road was thus only twenty feet wide, and supposed to be half on the land of Davis. Assuming it to have been in existence in 1899, the northwest and southwest corners which the surveyor fixed for Lot No. 2 were about sixty-six feet from the center of this road and fifty-six feet from its margin. Neither the deed nor the field notes say anything about a road. This is not a case in which the boundary fixed is in fact the edge of a road either public or private."

(Here the Court correctly quotes the trial Court's finding, as follows:)

"The only thing that tends to make the strip in contest a road, or the equivalent of a road, is the parol evidence that the Rogers brothers during the survey informed the surveyor, as found by the court, that "they would leave the 66 feet out of the partition and use the same jointly, and keep it like it was; the same 66 foot tract was then being used IN PART as a logging road". (The court em-

phasized "in part".) "There was no conveyance to dedicate the strip to the public as a road. It was subjected to no easement over the whole of it so as to convey the whole strip into a roadway. There is a plainly expressed intention not to add the strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road. The case presented is not one requiring an extension of the deed beyond its true calls."

The testimony of those acquainted with the land in controversy at the time of the partition is stated in narrative below, with page references to the Record:

Wiley Davis, petitioner's witness, owner of the land lying immediately west of the land in controversy, with regard to the road in question, in so far as it abutted his property stated that prior to the road he cut out himself "There was no road there (R. top page 201); that he constructed the road in question, setting his fence back from his corner 15 feet, and (R. 202) there was no road there until he cut it out himself. And (R. 201), when he fenced his land the pine bearing tree marking his northwest corner stood outside the road he built, on the northeast side of the road, and (R. 202) his northwest corner was northeast of the tree (R. 198) seven varas, as shown by his deed—placing all the road at that time on the land of Wiley Davis. And (201), the pine knot driven for Wiley Davis' northeast corner "was out from that pine tree a little east of north."

The witness Wiley Davis, now over 80 years of age, parted with his title to the land off which he cut the road a very few years after cutting out the road, and at the time of the trial had no interest in claiming the roadway in connection with the land he had long ago parted with.

F. E. Rogers testified (R. 225) "When they cut the road up there the road came **almost to the pine tree, I guess.** "I did not help cut the road out to the school" (on northwest corner of Wiley Davis land) "but I hired some men to work from a certain point. **Wiley Davis cut from here to where he had his fence.** And, (R. 226), "If the road that Davis and I and the others had cut out had gone on straight north to the north line of the Thomason Survey and continued on North it might have run over the pine tree. **The pine tree was about seven feet from where the pine knot represented the corner.**"

J. E. Sport (R. 237)—had known the land since 1892; confirms road as being between school-house (on Wiley Davis land) and the pine tree witnessing pine knot marking center of survey seven feet northeast of the pine, said center-point being the boundary between the land of the Rogers heirs, the east-half of the Thomason Survey, and the western half. (R. 239) Sport helped put the road there.

The evidence of petitioner's engineers and other witnesses who became familiar with the land twenty-five or thirty years after the partition is not very com-

petent as to what they found on the ground so long afterward, but petitioner's engineer, Baker, witness for petitioner, (R. 124-125) placed the east edge of the road not as adjoining petitioner's leasehold, but 57½ feet west thereof. This witness testified he made a title map (Exhibit 14 (R. 294)) before beginning his survey (R. 95), on which he platted the descriptions from the patent on down to the present. He testified with relation to this title map, and it was later introduced as petitioner's said Exhibit 14; this being called to the Court's attention that it might not unwarrantedly consider it reflected the results of any survey on the ground.

On page 153 of the Record, petitioner's witness and engineer Leuty, in regard to his survey, which did not follow the distance-calls of the partition deed to J. F. Rogers but was made purposely to include the land herein in controversy, testified:—

> **"We set a corner 66 feet from the gear wheel. We put an inch and a half pipe there and marked some trees. The trees were within seven feet of the pipe. There was no road where we set the pipe. There had been an old road west of it. I will say twelve feet."**

showing that the only old road he found at or near the pinion and gear-wheel at the south end of the land in controversy herein was situated twelve feet west of the west line of the land in controversy herein—completely off of it.

Petitioner's witness Clements (R. 188):

"When I first knew the Davis land there was no road between it and the Rogers land to the east. I remember when the road was put there but I do not remember the year. I worked on the road. Mr. Davis had probably ten or twelve acres fenced right along the road next to the highway but the north end was not fenced. Mr. Davis did not later fence it. It was fenced next to the highway when I cut the road out but the other part was not. I helped cut a part of the road out that runs from the Gladewater Highway to the northeast corner. All of the road was not cut out at one time. Davis' fence on the east ran to where the road was cut but his fence did not go clear to the north line. The road was not cut out to the north line.

"There were several marked trees running along where the road was put. They cut the trees down and tried to put the road about the center of the line where the marked trees were."

* * *

"The road went right up to the Edwards Survey and then turned west across part of the school grounds. It ran west of the original pine tree."

* * *

"When I helped cut the road out it was about sixteen feet wide. The road north from where I stopped cutting to the north line of the survey was about twenty feet wide. The west side of the road was fenced."

Petitioner's witness W. H. York (R. 194) testified:

"The road when it was cut out north was from sixteen to twenty feet wide."

And with respect to any road south of the Longview and Gladewater Highway, York said: (R. 196)

> "I cannot recognize any part of the road running south in the picture. It is just a country road running through the trees and used for stock, getting them out of the bottom."

We feel, therefore, the Court may safely conclude there was ample warrant for the holding of the Circuit Court of Appeals that there was no road on the strip of land in controversy anywhere near the line of petitioner's leasehold, and that the finding of the trial court that the strip was left **"in part"** for a road was somewhat more than a liberal condescension in behalf of any testimony concerning any road there at the time of the partition in question.

Respondents feel called upon at this point to correct any serious misapprehension which might be derived from the map in the petition herein, appearing between pages 16 and 17, entitled **"Map drawn from trial courts' Findings of Fact and Conclusions of Law."** Respondents have carefully read and re-read the Findings and Conclusions and are wholly unable to find any reference to the strip in question being a road at the time of the partition except the Court's quotation of the statement of F. E. Rogers (R. 222) on the witness stand. Here Mr. Rogers stated the agreement of the heirs on the ground at the end of the survey which first revealed the strip of land in controversy, in the following words, as quoted by the Court: "We will just keep that as it

is." Then Mr. Rogers added, on the witness stand in 1936, "the same 66 foot tract was then being used in part as a logging road." We believe when the full facts about the actual agreement of the heirs on the ground, "We will just keep that as it is," are presented they will disclose a very different picture than that depicted in petitioner's map hereinabove referred to, alleged to reflect the Findings and Conclusions in this case.

In the face of all the evidence and holdings of the Circuit Court of Appeals, we think petitioner's map in the petition, above mentioned, showing all the strip herein in controversy as a road, presuming to reflect the Findings and Conclusions of the trial court, is a very misleading and serious misrepresentation of any fact properly derived from the evidence or the holding of the court in question.

There is nothing so misleading nor so hard to eradicate from the mind as a visual misrepresentation of fact. This map has no support in the record or in the findings, and visually misrepresents the area in controversy as it was at the time of the partition in question. It further carries the misleading import that it reflects the findings of the trial court as a whole, whereas it wholly fails to show that setting the whole of the J. F. Rogers tract over 66 feet westwardly to cover the land in controversy herein would displace all the other lines and corners of the survey and leave unpartioned corresponding strips along both the southerly east line, as indicated in the finding of the trial

court, as well as along the northerly east line of said Rogers Lot 2, as pointed out by the Circuit Court of Appeals, and likewise would make it impossible to reach the beginning point in the description as called for. We submit the evidence and findings do not in any wise support it, other than as a fair representation of the land as a whole as actually partitioned, irrespective of any question about a road or any call for adjoinder in question, although at the time of the partition and survey the Mings 2-acre tract shown in the northwest corner of the J. F. Rogers tract in blue on the map had not been cut out thereof. We are unable to protest about the character of map petitioner might choose to insert in its petition herein, but if such a map is to be referred to as a reflection of the record or findings, it would more faithfully serve its mission if it showed that the land in question was at that time in the woods and unfenced on either side except a strip along part of Wiley Davis' land, and that logging roads ran unhindered anywhere across any land in the vicinity, whether of the Rogers or of Wiley Davis, as testified to by Wiley Davis concerning such a logging road used by them across his land, hauling logs from any available stand of timber to the transient saw-mill already sold by the Rogers at the time of the partition, as testified by F. E. Rogers, who on the witness stand merely remarked that at that time of the year (in February, the time of the partition) they had used the land in controversy herein as a logging road. We do not attempt to tie these facts to the record, but they have better

warrant for consideration than the map in question, if it is to be referred to as reflecting the facts disclosed by the record and found by the courts below as existing at the time of the partition in 1899.

The references to the record and findings and holdings of the courts below, hereinbefore set out, show that petitioner has devoted 20 pages of its brief in discussing authorities that have no application to the facts of the instant case. Petitioner's lease, when confined to its distance-calls, does not margin any road or highway; there is no call in petitioner's lease or the J. F. Rogers deed of 1899, under which it holds, for a road or highway as a boundary, and neither petitioner nor its lessors acquired their title upon the strength of any map or plat showing the J. F. Rogers tract as bounded by a road or highway. The record shows that there was a strip of land anywhere from 50 to 66 feet in width lying between the J. F. Rogers land, cornering on the old pinion and gear-wheel, and the road over next to the Wiley Davis land or actually on the Wiley Davis land. The existence of this intervening tract can be seen from petitioner's own maps in evidence. Therefore, we submit petitioners' authorities and arguments are based upon a false presumption and have no application to the instant fact situation. Every case cited by petitioner in behalf of its First Proposition in its Petition is one of three kinds:

1. The described tract actually margined a road, highway or street.

2. The calls of the described tract called for a road, highway or street as a boundary; or

3. The tract was purchased with reference to a map or plat showing it to be margined by a road, highway or street.

The facts here do not bring this case within any of said three classes of cases supporting petitioner's position. The facts are wholly different from those of any case or relied upon by petitioner, and, as said by the Circuit Court of Appeals:

> **"But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip."**

We believe such intention not to convey the strip is unmistakably revealed in the agreement entered into between the Rogers heirs on the ground with the surveyor at the time of the partition, as disclosed in the record and found by the trial court and the Circuit Court of Appeals, and J. F. Rogers being a party to such agreement no reservation or exception was necessary in the partition deed to him to prevent the land in controversy from passing on the strength of the presumption urged by petitioner here. Not only is such agreement and intent not to partition said land in controversy revealed as above stated, but it is adequately indicated by the descriptions in petitioner's chain of title alone, and by the old pinion and gear-wheel

standing unchallenged, marking the stake set by the surveyor, for more than thirty years, not only marking the southwest corner of petitioner's leasehold estate and the northwest corner of Lot No. Three of said partition, but within the knowledge of the witnesses living in the immediate vicinity during that period testified to as traditionally and reputedly marking the boundary of the J. F. Rogers tract and petitioner's leasehold estate, and permanently witnessing the ancient agreement of the Rogers heirs to leave undivided and owned in common by them the land in controversy herein.

We call to the attention of the Court that the presumption relied upon by petitioner is not a conclusive presumption or rule of law, even in fact situations which permit of the application of the presumption. It is said to be founded on a rule of construction in arriving at the intention of the parties. It is said in 11 C. J. S., 581: that "the rule is not absolute, but one of construction, effect being given to the intention of the parties in view of the whole instrument and surrounding circumstances." And; as said in 11 C. J. S., 696, "the presumption that the boundary of land abutting a highway or street extends to the center thereof, and that a grantor intended to convey to the center, may be rebutted." This is true even in cases where the land actually margins the highway. As said by our Supreme Court in Gill v. Peterson, supra, quoted by respondents in connection with their Point I, concerning such presumptions:

"Moreover, these rules, like other rules for construction of grants and for ascertainment of boundaries, as has so often been said, are controlling only when under the facts of the particular case they best enable the courts to arrive at the intention of the parties."

On pages 39 and 40 of petitioner's brief the contention is made that the cases of Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 57 S. W. (2d) 1080, cer. den. 288 U. S. 603, and Gulf Production Company v. Warren, 99 S. W. (2d) 616 (Tex. Civ. App. Writ of Error Refused) prohibited the admission in evidence of testimony showing that the surveyor Simmons stopped at 440 yards west of the northeast corner of Tract No. 2 and set a stake leaving the strip out of the partition for a road. Those cases hold that if land is margined by a road (Railroad) or conveyed by field notes which call to run along or with a road (Railroad) owned by the grantor, then parol evidence is not admissible to show the road was excluded. But in the instant case, as has been shown and as the Circuit Court of Appeals found, there was no call for a road and no description that margined a road. The trial court did not find anything about a road other than the reference to the agreement stated —**"We will just keep that as it is"** (R. 222)—made by the heirs at the Survey, referred to in the testimony of F. E. Rogers, after stating which (on the witness stand in 1936), as quoted by the Court in its finding, said witness remarked that the land in controversy had been **"used in part as a logging road."** The evi-

dence we have set forth and the finding of the Circuit Court of Appeals show it to be a narrow strip not perhaps at most over five feet wide, on the farthest western extremity of the land in controversy, the remainder being on the land of Wiley Davis, to the west.

Further, this testimony was not introduced upon any issue as to a road. Upon the theory that the field notes to tract No. Two were ambiguous when applied to the ground, and upon the testimony of petitioner's own engineers as to such ambiguity, as recited in the finding of the trial court, the testimony was introduced to show where the surveyor actually went, and in rebuttal to surveying testimony introduced by petitioner itself, thoroughly warranting respondents in submitting proof as to the survey as actually made. Further, time after time, on direct examination of petitioner's first witness, Baker, it brought out references to a road along the western extremity of the land in controversy, and as to the findings of said witness with regard thereto, and petitioners themselves having brought out this evidence, respondents were entitled in rebuttal to show by their witnesses where the road actually went and the agreement of the Rogers heirs with regard to the strip of land in controversy and its relation to the road in question. If petitioner objects to such reference by F. E. Rogers to the road as unauthorized and demands said witness' reference to the road be stricken or ignored, respondents have no objection; but the testimony of said Rogers regarding the actual survey as made

and the agreement and intention of the parties to exclude from the partition and hold in common the land herein in controversy is in the record with ample warrant and authority of law, as hereinbefore shown in respondent's foregoing points I and II.

As to the competency of said witness in regard to the testimony in question, under the Texas law, some member of the orginal surveying party is competent to give such testimony. Said witness was not only a member of such party but one of the heirs whose land was being surveyed and partitioned. **Vireca Corporation v. Cole,** 129 S. W. (2d) 433 (Tex. Civ. App., Writ of Error Refused); **Gill v. Peterson,** supra; **State v. Sullivan,** supra; **Blake v. Pure Oil Co.,** supra; **Humble Oil & Refining Co. v. State,** 104 S. W. (2d) 174 (Tex. Civ. App., Writ of Error Refused); **Beck v. Gulf Production Co.,** 113 S. W. (2d) 258 (Tex. Civ. App., Writ of Error Refused).

As we have stated, without exception petitioner's cited authorities on its First Proposition are cases in which the land conveyed margined a road; where the calls in the description called for a road, or where said land was sold with reference to a map or plat showing it to be margined by a road, none of which circumstances apply here. It is obvious that if a grantor can sell his interest in a road, even abutting his land, and retain the abutting land, he can also sell the land without selling his interest in the road, if the intention to do so is clear. Such intent and agreement is unques-

tionably manifest in the survey and partition in this case, apart from the testimony of F. E. Rogers, complained of, from the fact that no part of the road in existence at the time of the partition in 1899 was contiguous to the J. F. Rogers tract or in fact within fifty feet of it, as disclosed by many of petitioner's own witnesses and engineers, and many of the most competent witnesses left considerable doubt any of the land in controversy was in the road in question, as we have shown. The testimony was **not that the tract was retained in common by the heirs as a road,** but that it **has been used in part as a logging road.** (As F. E. Rogers testified (R. 222), "We had sold the mill but the road was still there"—indicating it had been a logging road.) The land was of no considerable value then, as disclosed by the consideration in deeds of the period of record, running $3.00 to $4.00 an acre, but now that the strip in question is worth many times the whole of the original Rogers Estate then partitioned, petitioner would claim it on the strength of a road not mentioned in its chain of title, not represented to it as having any relation to it, and only found by the Rogers heirs to exist on their land, or part of it, when they had completed their survey for the partition, in 1899.

As we have said, there was nothing in petitioner's chain of title to reveal even the possibility of the existence of the land in controversy herein. The patent to the Thomason Survey (R. 96) called for a 640-acre

survey. The Rogers boys owned the east half, as will be seen from the deed to their mother, Louisa Rogers (R. 103). This deed is in varas, calling for a tract 1900 varas long by 950 varas wide. 1900.8 varas is 1760 yards. So, in yards, the land partitioned called to be 1760 yards north-and-south by 880 yards east-and-west. Thus, as said by F. E. Rogers on the witness stand (R. 220), "The east half was rated as 320 acres in the deed." So it will be seen that when Surveyor Simmons located two of the partitioned tracts in the north half of the 320 acres, he had two tracts each 440 yards long, thus accounting for all the record length of the north line of the partitioned tract. Surveyor Simmons had theretofore surveyed the west half of the survey (R. 220) and evidently knew the location of the east line thereof, for when he got to the end of his 880-yard measurement from the northeast corner of the Survey, he remarked to the heirs there was yet a chain or 66 feet between that point and the east line of the western half of the survey (R. 222). By this time, as shown by the record, they had done a lot of work. This fact must be borne in mind, as it has preponderant bearing on this whole case—perhaps is the most important element revealed by the evidence.

Analyzing Rogers' testimony (R. 220 et seq), we see they had chained and doubtlessly marked lines completely around the W. H. Rogers Lot No. 1, a tract 440 x 880 yards, a distance of a mile and a half, then walked a quarter of a mile back to the northwest

corner of said Lot 1 and surveyed and chained from there to the 880-yard measurement where the surveyor found the excess chain left over, indicating the 66-foot strip. As will later be revealed, he had also marked bearing trees at corners and possibly lines-trees along the course, as is the practice in timbered country.

Somewhere along their course, it becomes evident they had changed their plan of the partition. When they began, they had told the surveyor they wanted the land cut into four 80-acre blocks (R. 221). When they finished the tracts were as shown by the outline sketch misrepresenting the Court's Findings, in the petition herein.

To show the evolution of this change in plan of partition, it is necessary to leave the testimony of Rogers, protested by petitioner here, and take up petitioner's own evidence. Petitioner seems to prefer it, and it suits our purpose better here, also. It will be noted that from pages 264 to 274, inclusive, of the Record, petitioner introduced some most valuable evidence which had not been made available to respondents, which petitioner secured from a real estate man, R. M. Wood, who once owned a tract in the J. F. Rogers Lot 2 of the partition and still held several old papers pertaining thereto. In this introduction, petitioner submitted the original field-notes and plats of most of the survey, in the handwriting of the surveyor himself. This evidence was introduced in attempt to disprove Rogers' testimony as to the survey (R. 220 et seq.) While not accomplishing

this purpose (so held by the Circuit Court of Appeals (R. 335),) this evidence served to reveal almost all the facts about this survey, instead of just those facts Rogers could remember after an interval of 40 years.

It will be noted that the original exhibits so introduced by petitioner are shown by photostatic copies, pages 269 to 274, inclusive, of the Record. Apparently these exhibits are not here shown in the order of their preparation or in the order of the survey, but that little matters. Petitioner contends this data conclusively proved Simmons surveyed only the southern line of partioned Lots Nos. 1 and 2, as shown by its photostatic Exhibit No. 45, page 269 of the Record, as found translated into type on page 265. It appears they did not examine and analyze them closely enough.

As willl be remembered, Rogers testified the surveyor was asked to cut the land into four 80-acre blocks, and that Simmons started at the northeast corner of the 320-acre tract and first surveyed the W. H. Rogers tract, Lot No. 1. That he then began at the northwest corner of said Lot No. 1 and surveyed Lot No. 2, for J. F. Rogers, along the north line of the tract, over to the 880-yard point, where he found the excess strip in controversy here.

Proceeding on the theory that Rogers thus told the truth and remembered correctly, at least as to the beginning of their surveying work, we will first examine and analyze petitioner's Exhibit No. 46 (R. 271), upon which it will be seeen the surveyor drew the rectangular

outline of Lot No. 1, surveyed as an 80-acre tract. Underneath this, in handwriting, he shows the field-notes, bearing trees, etc. of his survey of this lot, showing that he started, as stated by Rogers, at the north-east corner of the survey, but first went south to the center of the east line of the Thomason survey, calling for the bearing trees at this point; then he proceeded west 440 yards to corner, (this marking the dividing corner between Lots Nos. 1 and 2 on their south line), which the surveyor at this point describes as "being the center of the Rogers Tract" under survey—that is, the center of the 320 acres—which would have been exactly true if there were no excess in the line than under survey. After fixing this point on the ground by a bearing on a pine stump, the surveyor proceeded on west 440 yards more "to corner 4 (not shown on plat) to Bozeman land." This exhibits with absolute certainty that at that point in his survey Simmons, knowing he had gone west 880 yards from the east line of the Thomason Survey, thought he had reached the Bozeman land—the west half of said Thomason Survey. At this point he takes a bearing on a Pine S 65 deg. W 6 links and Pine S 80 E. 14 links—witnessing corner now marked by pinion and gear-wheel. He then calls to "corner back to corner 3, center of the tract" (dividing point between Lots Nos. 1 and 2) "and run north 880 yards to corner 5" (in north line of Thomason Survey) "Pine N 40 deg. E 5½ links and Pine S 32 deg. W 11 links; thence East 440 yards to starting point, containing 80 acres," (as testified by Rogers) "which is

Lot No. 1, less 4-4/5 acres off for J. W. and F. E. Rogers, platted red." This 4-4/5 acres is noted in shaded area in rectangle in southwest corner of surveyor's exhibited plat of the 80-acre tract, Lot 1.

Thus, Simmons actually surveyed out Lot No. 1 as an eighty acre tract, and, at this stage of his work apparently merely sketched the 4-4/5 acres in, "platted red", for as yet there is no indication, by calls for bearing trees, etc., it had yet been surveyed.

It is well to note here, that while surveying the south line of said Lot 1, the surveyor, as shown by said Exhibit 46, went on all the way across the land in partition, 880 yards, in a straight line, to what he at that time thought was the east line of the Bozeman west half of the Thomason Survey, from which point he came back to finish the survey of said Lot 1, as disclosed by said Exhibit No. 46.

Since the surveyor did not discover the existence of the excess 66-foot strip in his survey of said south line of Lots Nos. 1 and 2, it is obvious he must have done so by a survey of the north line of the J. F. Rogers tract, at the point testified by F. E. Rogers the surveyor actually found the excess strip in question here.

At some stage in the above surveying, careful analysis reveals inevitably there must have been some discussion among the heirs, who were with the surveyor, about the relative value or desirability of the

four tracts when blocked in equal 80-acre parts, as ordered, or the fairness of division in that manner. As willl be remembered, all the improvements were on the north half of the 320-acre tract (R. 222 and 228), and through this north half ran the public road between Longview and Gladewater (see plat in petition), giving to Lots Nos. 1 and 2 advantageous accessibility, and leaving the joint tract of the younger boys a quarter of a mile from the road and relatively undeveloped. The older boys, W. H. and J. F. Rogers, had their homes on the northern tracts (R. 222), and naturally preferred their portions should include them. The younger boys, being unmarried, were willing to take their together, to the south. But, from the nature of the subsequent survey, as will be shown, it seems the question of the old homestead or "home place" came up for consideration, and we find F. E. Rogers testifying (R. 222) about the surveyor later cutting out this old "home place" for the younger boys. It will be noted that the only "cutting out" that was done was out of the south central part of the northern tracts, Lots Nos. 1 and 2, as shown by the deeds and sketch or plat in the petition herein, so it becomes plain that must have been the location of the old "home place" which, after commencing the survey, the heirs decided should go to the younger boys. As Rogers testified (R. 222) "He (Simmons) then went over and surveyed out the old home place for myself and my brother, J. W."

Petitioner's Exhibit No. 45, a photostat of which is shown on page 269 of the Record, and a translation into type at page 265, unquestionably represents the surveying work by which the old "home place" was cut out for the younger boys, thus altering the form and acreage of the respective portions as indicated by the deeds in evidence and petitioners map in the petition.

In surveying this line, we find from the surveyor's own handwriting, as alleged by petitioner, the following field notes:

"Starting at corner No. 2 which is the S E C of W H R Tract, witness tree Red Oake S 69 deg. E 10 links & Pine N 43 deg. W 14 links with cross on each tree;

"Thence West 374 yards, no witness trees given.

"Thence North 308 yards, Red Oake S 45 deg. E 4 links;

"Thence West 66 yards to J. F. R. Line Pine S 2 deg. W 27 links;

"Thence West 154 yards, no witness trees given;

"Thence South with about 12 deg. West about 310 yards, no witness trees given. Thence West 224 yards to corner 4" (Referred to and described at this point by Petitioner's Exhibit 46, hereinbefore discussed—being the point now located by the old pinion and gear-wheel) (Copying, continued): "Witness Trees Pine S 65 deg W 6 links & pine S 80 deg E 14

"Thence South 880 yards to S W C of Tract

"Thence East 880 yards to S E C of Tract

"Thence North 880 yards to N E C of Tract the Starting Point. Containing 176 acres for J W & F E R Lot No. 3—Plated (Platted) Red" (The photostat of the plat referred to will be seen on page 270 of the record).

F. E. Rogers had testified they surveyed around the north half of the partitioned land but not around the south half thereof (R. 225). As will be noted, the last three calls of the description, from "corner 4" referred to by the Surveyor, located at the old gear wheel, to the Southwest corner of the tract, then to the Southeast corner and back to the starting point, indicate no bearing trees, as do most of the other calls, tending to substantiate the testimony of F. E. Rogers they did not go around the south half.

It is vitally important to note at this point that on his second survey of the south line of the partitioned Lots Nos. 1 and 2 the surveyor, when he had reached the total western distance called for—880 yards—bringing him to the point where on his first straight-line survey he had called for the "Bozeman Land", carefully mentioned the same bearing trees and, apparently just as carefully, **failed to mention the "Bozeman Land"**. This further supports F. E. Rogers' testimony the surveyor first learned of the 66-foot strip at the end of his survey of the north line from the northwest corner of the W. H. Rogers Lot 1, 440 yards west there-

from, or 880 yards west of the northeast corner of the Thomason Survey—the original beginning corner. Petitioner introduced no field notes of the surveyor showing a survey of the north line of the J. F. Rogers tract, and in the Circuit Court of Appeals argued that the field notes of the survey introduced by it contradicted the witnesses as to where the surveyor went and how he located the corners of Lot No. 2; but the Circuit Court of Appeals stated in its original opinion:

> "It so happens that the field notes of Lot No. 2 have not been found. Those for the other lots do not show the surveyor at or near the Wiley Davis corner, or measuring the north line 440 yards or any other length, for this line was not common to the other lots. Only the field notes for Lot No. 2 would show what was done at or near the northwest corner of that lot. There is no contradiction of the witnesses by the field notes introduced."

On the other hand, these field notes and exhibits introduced by petitioner, properly analyzed and considered in relation to the testimony of F. E. Rogers and the other testimony of record, reveal a remarkable confirmation of respondents' evidence and contentions herein. So considered and analyzed, it is certain they can offer little cheer to petitioner.

Respondents feel that we now have before us the facts necessary to show, without apparent doubt, why the 66-foot tract was omitted from the partition and retained in common ownership, as testified by Rogers. As hereinbefore stated, Petitioner's Exhibit No. 46, first

discussed, showed they had surveyed and chained one and three-quarter miles, and necessarily retraced their course three-quarters of a mile more, making a total distance on that initial survey of two and a half miles, besides the marking of line and bearing trees and carefully recording all this detail. Then, as related by F. E. Rogers, they came back a quarter of a mile to the W. H. Rogers northwest corner, and surveyed and chained a quarter of a mile to the point 880 yards from the northeast corner of the survey, where the surveyor discovered the excess 66-foot strip, making three miles they had chained, marked, recorded and retracted when the excess was noted.

As shown, this 66-foot strip extended the full length of the western line of the partitioned land. In all, it contained eight acres, exactly, which was all excess acreage they had not contemplated, over the 320 acres called for in their deed. The whole eight acres might have been worth $25.00 or $30.00, as indicated by the deeds of that period in evidence here. To apportion said strip equably among the partitioned tracts would require re-surveying, re-locating and re-marking many of the lines and corners they had already established. Also, it would require arduous computation to distribute the small equities therein among the irregularly shaped blocks of the partition, as will be noted by a glance at petitioner's outline map in the petition. Surveyors cost money and money was scarce in 1899 and land somewhat plentiful in Texas. A large part of the value each

tract would gain by the apportionment of the eight acres would be consumed in surveying expense. If they left it like it was, they would all still own it and, if they chose, could dispose of it among themselves later if they saw fit. Under these circumstances, what more natural, rational, common-sense view could they take of the matter, with yet other long and arduous surveying ahead of them, than there to agree, as F. E. Rogers states they did, "We will just keep that like it is". (R. 222).

Thus we can find no warrant, from any fact established by the evidence, any finding of either court below or any probability even that might be deduced from the record, for petitioner urging, commencing with its Assignment of Error No. 1 (R. 302):

> "The Court found substantially the following as the facts: * * * the surveyor * * * stopped at a point 880 yards west of the northeast corner * * * and then surveyed south 880 yards and set another stake, **leaving a 66-foot strip out for a road at the request of said heirs** * * *" etc.

and further adding to such represented findings of the Court,

> "(d) that thereafter, the heirs exchanged deeds, the said J. F. Rogers being partitioned a tract that the field notes in his deed when applied to the ground by course and distance * * * extended **only to the inside (east) line of said road** * * *"

when as a matter of fact there is no testimony in the record that such field notes came anywhere near any

road on the land in controversy at the time of the partition in question from which petitioner's field-notes were derived, and such finding would be utterly hostile to every material fact in the record bearing upon the location of any road on the ground at the time of said partition, even to the testimony of all petitioner's own witnesses; and, further, (R. 303), in the same Assignment of Error, petitioner contending:

> "Under said findings of fact, Complainant's lessors acquired by said partition deed the **fee simple title to all of said 66 foot strip since his field note description by course and distance went to the inner edge of the road, which road was wholly laid out on land belonging to his grantors** * * * "

when as a matter of fact none of said allegations are or ever have been true, and the same are contrary to the preponderance of petitioner's own evidence and the findings of the courts below, and this petitioner well knows.

Respondents see no occasion for the courts below if facts of the record can so materially be ignored and mispresented as to require the devotion of perhaps the larger part of their brief to the correction of petitioner's factual presentations not founded in the evidence or any finding of the courts below, thus presenting a de novo trial on the facts before this Court.

As under previous issues covered herein, involving petitioner's fundamental authorities, respondents find it impossible most effectively to proceed with a fair

discussion of the road issue without necessity of devoting far more of such discussion to the correction of petitioner's repetitious mispresentation or assumption of the basic facts and holdings revealed by the record. It seems, as we proceed, its whole case is built, on the one hand, upon mispresentation of decisions allegedly supporting its propositions and, on the other, upon mispresentation of the facts of the record allegedly supporting its authorities.

Petitioner's urged **legal title** predicated upon a road margining its lease or upon a strip intendedly left for a road by partitioners is no more supported by the record or findings of the courts below than its **legal title** on the call for adjoinder was supported by a full quotation of its cited cases of Swann v. Mills, Garrison v. Crowell and Miller v. Southland. Even as one loses petitioner's case in consulting its authorities, he finds he also loses petitioner's authorities in attempting to apply them to the petitioner's case.

The substantive law of Texas having been followed strictly throughout all the courts below, as we believe is adequately instanced by the abundant authorities of our Supreme Court presented in the foregoing Points I and II of this brief and as cited in the opinion of the Honorable Circuit Court of Appeals itself, all applicable and pertinent to the facts adduced and found in this case, any inference that the Circuit Court of Appeals decided any issue in this case contrary to the rule and spirit of Erie Railroad Co. v. Tompkins, 304

U. S. 64, 58 Sup. Ct., 817, 82 L. Ed. 518, 114 A. L. R. 1487, can be true in the face of the Texas Supreme Court decisions applicable to the facts in this case only if it is to be held the Supreme Court of Texas either doesn't know or hasn't declared the laws of our State.

We see no virtue in citing authorities to refute contentions and issued based upon factual presentations foreign to the record, findings and holdings of the courts below. We have no complaint of petitioner's cases but of the use it seeks to make of them. We see no virtue in "spanking" the courts below before adequately determining the charge presented against them has semblance of warrant more urgent than the record and findings in this case appear to reveal.

The following facts alone, being the essential elements of petitioner's issue of legal title predicated upon a road, preclude the application of the rules urged by it:

J. F. Rogers, petitioner's predecessor and origin of its title, was a party to the agreement to leave the land in controversy herein unpartitioned. The whole of said agreement (R. 222) was: "We will just keep that like it is"—that is, not included in the partition survey or in any of the land they had apportioned as their several estates. Nothing was then said about a road, and no road on it margined any of the partitioned land by more than 50 feet, as we have more than adequately shown. The said Rogers having been a party to said

agreement, accepted his title thereunder with full knowledge thereof, and there was no occasion to make any reservation in the deed to him, as contended by petitioner, to prevent passage of the title to the land in controversy to him on any presumption of adjoinder or contiguous road.

The descriptions in said partition deeds and petitioner's chain of title, as well as the monuments of survey therefor and the field-notes of the surveyor introduced by petitioner itself (R. 264-274 inclusive) all exhibit the intention of the partitioners to leave the land in controversy herein unpartitioned and owned in common by the heirs, as testified to by F. E. Rogers (222, Record).

Petitioner's chain of title and leasehold description making no mention of any road on the land in controversy, referring to no map or plat indicating a road, and no road actually margining its land at any point contiguous to the land in controversy, petitioner acquired no legal title on any theory of abutting road and acquired only such title as might be derived from its predecessor J. F. Rogers, who was a party to the agreement leaving the land in controversy in the common ownership of the heirs of Louisa Rogers, and they being the owners of record of the legal title thereto, petitioner had not only no legal title but not a vestige of equity therein.

IV.

That petitioner has exhibited that character of bad faith in equity, both toward respondents and the court in the instant case, in a matter having immediate and necessary relation to the equity sought by it in this litigation, as would deny it remedy in a court of equity.

So far was petitioner from considering itself the owner of the legal title to the land in controversy herein, as an innocent purchaser or otherwise, when its survey subsequent to its lease disclosed to it the existence of the land in controversy herein it prepared a so-called correction or "confirmation lease", changing the distance calls from yards to feet and extending same to cover the land in controversy herein, and proceeded by stealth, false representation, fraud and swindle to acquire by criminal means the leasehold title to which it obviously considered it had no legal claim. Its agent who procured the execution of this so-called "confirmation lease" admitted upon the witness stand (R. 171) that he had represented to petitioner's lessors said "confirmation lease" covered only the same land as its original lease in faith of which, and without attempting to compute the feet into yards for comparison with their original lease, but relying solely upon said representation, said lessors executed said so-called "confirmation lease", divesting themselves of the leasehold estate in the land in controversy herein, wholly without consideration. These facts were testified to also

by F. E. Rogers (R. 224) and by J. E. Rogers (R. 258), the latter witness testifying as follows: (R. 258)

> "Later on, Mr. Cox came to me with a ratification instrument. He told me that it included the same land the Chandler lease had. I found out that it included more land than the Chandler lease and, after I found it out I said something to Mr. Cox about it in front of the filling station that I was operating at that time.
>
> "Q. What did he say about it?
>
> "A. He said he was working for the company.
>
> "Q. He said he was working for the company, and you would have to blame them?
>
> "A. Yes."

The trial court held such "confirmation lease" void as fraudulently acquired (Findings, par. 17, Record p. 68; Conclusions, par. 4, Record p. 71).

In this cause petitioner pleaded this so-called "confirmation lease" in its Amended Bill of Complain, paragraph IV (R. 24), upon which this case went to trial in the trial court, as an instrument of its leasehold title.

Thus petitioner has exhibited that character of bad faith in equity, both toward respondents and the Court in the instant case, in a matter having immediate and necessary relation to the equity sought by it in this litigation, as would deny it remedy in a court of equity.

Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203;

Deweese v. Reinhard, 165 U. S. 386, 390, 17 S. Ct. 340, 41 L. Ed. 757;

National Fire Ins. Co. of Hartford v. Thompson, 50 S. Ct. 288, 281 U. S. 331, 74 L. Ed. 881;

Keystone Driller Co. v. General Excavator Co., 54 S. Ct., 146, 290 U. S. 240, 78 L. Ed. 293—Motion denied 54 S. Ct. 556, 291 U. S. 651, 78 L. Ed. 1045;

Martin v. Luster, 85 F. (2d) 833, certiorari denied 57 S. Ct. 510, 300 U. S. 667, 81 L. Ed. 874;

Cochran v. Burdick, 89 F. (2d) 831, 67 App. D. C. 87.

V.

That any holding of the Circuit Court of Appeals about the procedural issue of burden of proof was not essential to the determination of the case, and any declaration by said court upon such question was therefore mere dicta. (Responsive to Propositions II, IV and V of Petition and Second and Third Points of petitioner's brief.)

(This point, by reason of the foregoing presentation, becomes so apparent upon mere statement, we cover it in a paragraph or two of the Conclusion, following.)

CONCLUSION

We do not wish to presume upon the time or indulgence of the Court to argue or discuss the emasculated

propositions that remain. All were built upon the fantasy of **legal title**, without warrant or authority in any recognized decision or declaration of our courts, and impossible of support in the very cases relied upon and so strongly and persistently urged at every point and in connection with every authority in petitioner's brief and petition. If the words **legal title** are deleted from petitioner's brief and petition there is no case before this Honorable Court, on the facts of the record here.

Without legal title, petitioner was in no position to urge a burden of proof contrary to the holdings thereupon of the Circuit Court of Appeals, and any expression by said Court upon this issue, whether right or wrong, was unnecessary to the decision of the instant case.

There is no point whatever to petitioner's proposition on reformation of deed and limitation in regard thereto, urged in its Proposition VI, inasmuch, as disclosed by our quotation from Wilson v. Giraud, supra our Supreme Court has repeatedly held, from time immemorial, that in such a fact situation as here presented there is no question of reformation, but only of giving effect to as many calls as possible in a defective and ambiguous deed description.

Petitioner hasn't failed to find abundant excellent cases to support the propositions of its brief, if only those propositions were pertinent to the record herein, but its whole case is built upon the commercial and propagandic theory that if it repeated the words "legal

title" frequently enough, in connection with every proposition and authority urged by it, it might have telling effect, and when this is supported by citations of authorities presented so as to withhold the very earnest differentiation of the Court itself against the very facts urged, it appears to have given pause, at least, to the Circuit Court of Appeals.

The correct determination of this case requires but a fair statement of the facts and issues related thereto. We are before this Court upon issues not fairly involved in the litigation, not essential to its determination, under the applicable laws of our States, and serving only to confuse and cloud its clear and simple outlines.

Earnestly we have endeavored to trace the familiar outline of the facts in this case in the petition and brief before this Honorable Court, but almost imperceptibly the trail leads from fact to fiction; from iron monuments to roads in heaven; from pinioned earth to the poetry of words, until it seems, in this supernal realm of the law, petitioner points to a wraith transformed. We strain to see, but through the haze our mundane eye views only the battered corpus that was. We would not dispute the reality of things unseen, and it may be there is substance in shadow. But the case presented here does not afford us even a silhouette that patterns the record below.

Our State is broad and covered with land that has been fought over from the time the turbulent Dons

planted upon it the Holy Cross. Good cases are multitudinous in our reports, as witnessed by petitioner's brief. We respect and honor them all. But the longer we practice and the broader our ken, occasionally we are led to wonder if Holy Writ isn't oft' quoted to devious ends.

Wherefore, respondents respectfully pray that the judgment of the trial court and of the Circuit Court of Appeals be affirmed.

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